

INITIAL STATEMENT OF REASONS (ISOR)

PROPOSED ADOPTION OF REGULATIONS PURSUANT TO PROPOSITION 56, THE CALIFORNIA HEALTHCARE, RESEARCH AND PREVENTION TOBACCO TAX ACT OF 2016, REV. & TAX. CODE, §§ 30130.50 – 30130.57

I. INTRODUCTION

In November 2016, California voters approved Proposition 56, the California Healthcare, Research and Prevention Tobacco Tax Act of 2016 (the Act). (Codified at Rev. & Tax. Code, §§ 30130.50 – 30130.57.) This measure increased the excise tax rate on tobacco products for the purpose of reducing smoking and thus reducing mortality, disease, healthcare costs, loss of productivity, and other adverse impacts of smoking. The Act also established the California Healthcare, Research and Prevention Tobacco Tax Act of 2016 Fund (the Fund) and designated the distribution of revenues from the Fund. (Rev. & Tax. Code, §§ 30130.53, 30130.55, 30130.57.)

Among other designations of tax revenues, the Act provides \$30,000,000 each year to the Department of Justice/Office of the Attorney General to be distributed to local law enforcement agencies to support and hire front-line law enforcement peace officers for certain programs. (Rev. & Tax. Code, § 30130.57, subd. (e)(1).) These programs include, but are not limited to, enforcement of state and local laws related to the illegal sales and marketing of tobacco to minors and increasing investigative activities and compliance checks to reduce illegal sales of cigarettes and tobacco products to minors and youth. (*Ibid.*)

II. PROBLEM INTENDED TO ADDRESS

The Act does not set forth further measures as to which entities are eligible to apply, the criteria for funding, the procedures for application, review or appeal, the requirements for recordkeeping and reporting, or several other matters fundamental to the creation and operation of a successful grant program. The proposed regulations implement, interpret, and make specific Revenue & Taxation Code, section 30130.57, subdivision (e)(1). In this way the Department has an opportunity to interpret the Act, to consult with and learn from stakeholders, to implement best practices in grant making, and to establish a grant program that fully realizes the promise that the Act holds for all Californians.

III. SPECIFIC PURPOSE, NECESSITY, ADMINISTRATIVE REQUIREMENT OR OTHER CONDITION OR CIRCUMSTANCE THAT REGULATIONS ARE INTENDED TO ADDRESS (SECTION-BY-SECTION ANALYSIS)

Section 999.300. Applicability and Scope

The proposed regulation describes the authority and funding source of the grants.

Section 999.301. Definitions

This proposed regulation sets forth the definitions of certain terms used in the regulations described in more detail below.

Regarding the definition of “minor”, the Act requires that the Department distribute grants to programs for “enforcement of state and local laws related to the illegal sales and marketing of tobacco to minors, and increasing investigative activities and compliance checks to reduce illegal sales of cigarettes and tobacco products to minors and youth.” (Rev. & Tax. Code, § 30130.57, subd. (e)(1).) The proposed regulations make explicit that the Department will fund projects relating to sales and marketing of tobacco products to youth and individuals below the minimum age for sale of tobacco products under California law. The proposed regulations define the term “minor” as a person who is under the minimum age for sale of tobacco products in California. This is currently set at 21 years of age. (Bus. & Prof. Code, § 22958, subd. (a)(1) [“An enforcing agency may assess civil penalties against any person, firm, or corporation that sells, gives, or in any way furnishes to another person who is under 21 years of age, any tobacco, cigarette, cigarette papers, any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, tobacco products, or any controlled substance . . .”]; Penal Code, § 308, subd. (a)(1)(A)(i).) This definition is consistent with the use of the term “minor” in various state statutes to mean an individual below an age that varies between 14 and 21 years depending on whether the context is obtaining a license to drive a vehicle, sexual consent, alcohol consumption, or employment. (See, e.g., *Esquivel-Quintana v. Sessions* (2017) 137 S.Ct. 1562, 1568; *Gouanillou v. Industrial Acc. Com.* (1920) 184 Cal. 418, 421 [“It cannot be questioned that the age of majority is a matter of legislative regulation and that the Legislature may prescribe a longer period of minority for some purposes than for others.”].) It would be unreasonable to define the term “minor” in a way inconsistent with its use in other California tobacco-related statutes.

Section 999.302. Request for Proposals

The proposed regulation provides that the Department shall promulgate Requests for Proposals. A Request for Proposals will contain information about the application procedures, including deadlines for a specific grant cycle, informing potential applicants how to avail themselves of the funding opportunity. The proposed regulations specify the types of information required in an application, including information about the applicant and a description and budget for the proposed project. Receipt of complete and timely information will enable the Department to evaluate each application. This procedure will enable the Department to modify grant-making priorities in response to changes in the landscape of tobacco control, while remaining consistent with the requirements of due process, the Act, and the regulations.

Section 999.303. Eligibility, Applications, and Joint Applications

This proposed regulation sets forth the eligibility criteria for the grant program. It specifies that local law enforcement agencies are eligible and that those agencies may submit joint applications if certain conditions are satisfied.

Definition of Local Law Enforcement Agencies

The Act requires that the Department distribute funds to “local law enforcement agencies.” (Rev. & Tax. Code, § 30130.57, subd. (e)(1).) Proposed section 999.301, subdivision (21) defines this term to include:

A division, department, board, office, section, or branch of local government, or institution of public education, that employs one or more persons appointed and duly sworn as a peace officer; city police department; county sheriff’s department; police protection and community services district; agency of a city, county, city and county, special district, or other political subdivision of the state that is authorized to enforce criminal statutes, regulations, or local ordinances; city or county health department that is authorized to conduct workplace inspections; city, county or regional public transit agency; city, district or county housing authority; police or school resource office of a K-12 school district; police department of the University of California, California State University, or California Community Colleges; city, district, or county attorney’s office; and any other local public agency that employs one or more sworn peace officers.

This definition follows the statutes that are closely aligned to local tobacco enforcement and the public health purposes of the Act. For instance, Penal Code section 308, subdivision (a), prohibits furnishing tobacco products to minors.¹ It provides for criminal or civil enforcement. It contains no limitation as to what local agencies may initiate enforcement, but restricts civil enforcement to actions brought by a city attorney, a county counsel, or a district attorney. Similarly, Business & Professions Code, section 22963, regulates remote sales of tobacco products. It contains no limitation as to what local agencies may initiate enforcement, but specifies that only city or district attorneys may assess penalties.² Another important tobacco-related statute is the smoke-free air provision in the Labor Code, section 6404.5, subdivision (i), which includes local health departments within the definition of local law enforcement agencies.³

¹ “Every person, firm, or corporation that knowingly or under circumstances in which it has knowledge, or should otherwise have grounds for knowledge, sells, gives, or in any way furnishes to another person who is under 21 years of age any tobacco, cigarette, or cigarette papers, or blunt wraps, or any other preparation of tobacco, or any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, tobacco products, or any controlled substance, is subject to either a criminal action for a misdemeanor or to a civil action brought by a city attorney, a county counsel, or a district attorney, punishable by a fine of two hundred dollars (\$200) for the first offense, five hundred dollars (\$500) for the second offense, and one thousand dollars (\$1,000) for the third offense.” (Pen. Code, § 308, subd. (a)(1)(A)(i).)

² “A district attorney, city attorney, or the Attorney General may assess civil penalties against any person, firm, corporation, or other entity that violates this section, according to the following schedule. . .” (Bus. & Prof. Code, § 22963, subd. (f).)

³ “A violation of the prohibition set forth in subdivision (c) is an infraction, punishable by a fine not to exceed one hundred dollars (\$100) for a first violation, two hundred dollars (\$200) for a second violation within one year, and five hundred dollars (\$500) for a third and for each

In the same vein, an “enforcing agency” for the provisions of the Stop Tobacco Access to Kids Enforcement Act (STAKE Act) includes “a local law enforcement agency, including, but not limited to, a city attorney, district attorney, or county counsel.” (Bus. & Prof. Code, § 22950.5, subd. (b).)⁴ These statutes indicate that, in the context of enforcement of tobacco laws, the term local law enforcement agency is properly defined to include any local agency that is responsible for enforcing state or local tobacco laws, including police departments, sheriff’s departments, health departments, and city, county and district attorney’s offices.

This definition is consistent with the current and longstanding practices of local enforcement of tobacco-related laws and ordinances in communities across California. A wide range of local agencies enforce such laws and ordinances, including but not limited to city police, special district police, county sheriffs, district and city attorneys, county counsel, city and county public health and environmental health departments, school district officers, public transit agency officers, and the campus police at the various campuses of the University of California, California State University, and California Community Colleges.

This definition is also consistent with the overall purposes of the Act, which are to enhance existing state and local efforts to reduce use of tobacco products. (Rev. & Tax. Code, § 30130.57, subd. (e).)

Finally, the definition in the proposed regulation is consistent with the statutory scheme laid out by the Legislature to define those who do and do not fit within the term “peace officer.” (See Pen. Code, §§ 830, et seq.) Those statutes indicate that there are numerous local agencies that perform law enforcement functions under certain circumstances and/or within certain geographical areas. It would undermine the purpose of the Act if funds could not be granted to a local entity that employs individuals who are at certain times or places engaged in enforcement of tobacco-related statutes or ordinances.

Joint Applications

Many small towns, tribes and rural counties in California have populations that make it impractical or inefficient to have stand-alone law enforcement programs to enforce tobacco-related laws. For instance, it may not be cost-effective for a lightly-populated county or small community to justify employing individuals solely to enforce tobacco laws. Similarly, an underage decoy buyer in a small community may be recognized by all tobacco retailers. The proposed regulation therefore sets forth a procedure for multiple local law enforcement agencies to submit a single, joint grant application. This will enable, for instance, agencies in adjacent counties or in cities within a county or in adjacent counties, to collaborate and submit a joint

subsequent violation within one year. This subdivision shall be enforced by local law enforcement agencies, including, but not limited to, local health departments, as determined by the local governing body.” (Labor Code, § 6404.5, subd. (i).)

⁴ “‘Enforcing agency’ means the State Department of Public Health, another state agency, including, but not limited to, the office of the Attorney General, or a local law enforcement agency, including, but not limited to, a city attorney, district attorney, or county counsel.” (Bus. & Prof. Code, § 22950.5, subd. (b).)

application. Allowing joint applications is likely to achieve the purposes of the Act more efficiently, and to reduce the administrative burden on the grant program. This is preferable to the alternative – prohibiting joint applications – which would result either in a very large number of applications for small projects, or in many smaller jurisdictions declining to participate.

The proposed regulation provides that joint applications will be evaluated according to whether the primary and secondary applicants have the capacity, through cooperation and communication, to further the purposes of the Act. It also requires that all the applicants assume responsibility for executing the projects proposed in a joint application. These two provisions are intended to safeguard against secondary applicants failing to meet their commitments.

For all these reasons, the Department proposes this regulation to allow for both single and joint applications.

Section 999.304. Competitive Process

The proposed regulation provides that all grants will be competitive unless stated otherwise in a Request for Proposals. The Department considered a requirement that all grants be competitive, but rejected this on the ground that it would constrain the Department's ability to award non-competitive grants under certain appropriate circumstances. The Department anticipates the possibility that a single applicant may choose to undertake specific projects such as providing training, technical assistance, legal resources or additional enforcement capacity to other jurisdictions or even state-wide. In such event the proposed regulations give the Department discretion to award such a grant on a non-competitive basis.

Section 999.305. Administrative Review

The proposed regulations set forth criteria for the Department's evaluation of applications. Evaluation is in three stages. The first stage is an administrative review of each application for completeness and timeliness, and to determine whether the applicant is eligible, as set forth in the Request for Proposals and the regulations.

Section 999.306. Disqualification

If an application fails the administrative review, it is disqualified and this section sets forth the criteria for disqualification. Disqualification is appealable; an application may be amended to satisfy the administrative review. In this way minor or technical defects or errors in an application may be identified and resolved expeditiously, thus advancing the goal to review all applications on the merits, if possible.

Section 999.307. Merits Review

The second stage of evaluation of applications is a substantive review by a merits review panel to make a recommendation whether or not to award a grant. The merits review panel will also assess whether, in light of the proposed project, the applicant is eligible.

Section 999.308. Evaluation Criteria for Merits Review

The Act describes the basic purposes for grant awards. (Rev. & Tax. Code, § 30130.57, subd. (e)(1).) This proposed regulation sets forth criteria for grants that satisfy the purposes stated in the Act, namely, to enforce state or local laws relating to the sale and/or marketing of tobacco products to minors, to pursue investigative activities to reduce illegal sales of tobacco products, and to conduct retail compliance checks to reduce sales of tobacco products to minors. This proposed regulation also sets forth additional criteria for funding. These other criteria meet the broader purposes of the Act. (See Healthcare, Research and Prevention Tobacco Tax Act, 2016 Cal. Legis. Serv. Prop. 56, §§ 1 & 2 (Proposition 56) (West); Rev. & Tax. Code, § 30130.57, subd. (e).), This is in accordance with the Act's provision that the funds are "not limited to" those specified in section 30130.57, subdivision (e)(1). This will give the grant program the ability to contribute towards achieving the purposes of the Act as a whole, and flexibility to respond to market dynamics, the emergence of new products, changes in the use of tobacco products, shifts in federal regulation and enforcement, and the impacts of other tobacco-related grant and enforcement programs. The alternative of not allowing funds for any purpose other than those specified in the Act would render the phrase "not limited to" meaningless. (Rev. & Tax. Code, § 30130.57, subd. (e)(1).)

The Act requires that no monies in the Fund be used to supplant existing state or local funds used for the same purpose. (Rev. & Tax. Code, § 30130.57, subd. (e).) This proposed regulation therefore includes, as one of the evaluative criteria and recommendations for funding, that funds received from the Department not be used to supplant state or local funding of any existing activities that have the same purpose or purposes as the Act. This measure is intended to ensure that no recipient that receives funds from other sources, for instance, Proposition 99 grants, fees generated by a local tobacco retail license ordinance, penalties arising from non-compliance with a tobacco-related ordinance, or a Proposition 56 grant from another state agency or a co-applicant in a joint application, will supplant that funding with Proposition 56 funds received from the Department for the same purpose.

The Act instructs the Department to distribute funds to local law enforcement agencies for certain programs. (Rev. & Tax. Code, § 30130.57, subd. (e)(1).) These programs – specifically those to reduce illegal sales and marketing of tobacco products to minors, and to increase investigative activities and retail compliance checks – are similar to existing tobacco-related programs of various local public health agencies and community organizations. The Department is aware that these local stakeholders, among other activities, conduct comprehensive surveys of tobacco retailers, participate in minor decoy operations at retailers, shape local tobacco policies including local tobacco retail license and smoke-free programs, conduct retail license inspections, participate in tobacco-related programs at schools and colleges, and communicate with local law enforcement agencies about local tobacco-related issues. Through these activities local stakeholders are often aware of new or pressing local tobacco-related issues. Recognizing these circumstances, this proposed regulation specifies that any application for funding includes an attestation as to whether or not the applicant consulted with local stakeholders, and that the merits review panel assess applications for indicia of support (or opposition) from local stakeholders.

The proposed regulation does not specify a manner whereby such indicia must be presented in an application. This is to allow maximum flexibility to applicants, recognizing that the indicia are likely to range from letters of support or attestations about a consultative process with local stakeholders, to an application that will sub-contract certain work to local stakeholders. However, requiring a presentation of some indicia will assist the Department to evaluate the extent to which each application accurately identifies and proposes to address local priorities and capacities. This proposed requirement is more reasonable than either a requirement mandating the form of the indicia, or a prohibition on such indicia.

Section 999.309. Recommendation for Funding

The third stage of evaluation of proposals is a review and recommendation, by the merits review panel, of the amount of funding for each successful application. This proposed regulation sets for the criteria and procedure for this third step. The merits review panel will submit its recommendations for approval or denial, and for funding amount, to the Attorney General or designee for a final decision. The merits and funding determinations of the Attorney General are not appealable. This is so that the Department may enjoy finality; be in a position to apportion and grant funds from the full quantum of available funds without holding a reserve for applicants that may or may not in due course successfully appeal denial of an application on the merits; not have to employ a merits review appeal panel; and may conclude each application and review cycle in a timely fashion and prepare for the next. Further, because a new cycle of funding will open each year, an unsuccessful applicant need not wait for a long period before submitting a new application. Also, because all merits determinations are reviewed by both a multi-member review panel and the Attorney General, the procedure already contains multiple levels of review.

Section 999.310. Merits Reviewers

This proposed regulation provides for the establishment of a merits review panel to evaluate applications. The panel may include subject matter experts and must have two or more members; there are safeguards against personal and family conflicts of interest.

Section 999.311. Award Notification

This proposed regulation requires the Department to notify all applicants, successful and otherwise, of the result of the application. This will satisfy due process notice requirements.

Section 999.312. Grant Agreement

This proposed regulation requires that successful applicants – to become recipients – enter into a written grant agreement with the Department as to the amount, conditions and performance of the grant award. Once executed, the successful applicant is a grant recipient. This written agreement, together with the regulations and application, regulates the required performance of the project through closeout of the grant. These measures will ensure that the grant process is clear and certain for all parties.

Section 999.313. Joint Grant Agreement

This proposed regulation requires successful joint applicants to enter into a joint grant agreement with the Department. These provisions are necessary to ensure that the grant process is clear and certain for all the parties bound by a grant to multiple local agencies.

Section 999.314. Prior Approval Required

This proposed regulation sets forth procedures to be followed in the event a recipient seeks to make changes to the project, budget or scope of work, and allow for imposition of additional conditions and termination in the event a recipient does not comply with specified obligations.

Section 999.315. Access

The proposed regulations generally require recipients to make records, sites and other materials available in the event of an audit, performance evaluation, or similar proceeding, to submit to audits and performance and financial compliance reviews, to submit timely progress reports, and to retain certain records for specified lengths of time. These measures will enable the Department and the State Auditor to evaluate the efficacy of the grant program and the recipients' adherence to the terms of the grants, and thus promote transparency and accountability.

Section 999.316. Performance Compliance and Responsibility

The proposed regulations generally require recipients to make records, sites and other materials available in the event of an audit, performance evaluation, or similar proceeding, to submit to audits and performance and financial compliance reviews, to submit timely progress reports, and to retain certain records for specified lengths of time. These measures will enable the Department and the State Auditor to evaluate the efficacy of the grant program and the recipients' adherence to the terms of the grants, and thus promote transparency and accountability.

Section 999.317. Financial Compliance

The proposed regulations generally require recipients to make records, sites and other materials available in the event of an audit, performance evaluation, or similar proceeding, to submit to audits and performance and financial compliance reviews, to submit timely progress reports, and to retain certain records for specified lengths of time. These measures will enable the Department and the State Auditor to evaluate the efficacy of the grant program and the recipients' adherence to the terms of the grants, and thus promote transparency and accountability.

Section 999.318. Reports

This proposed regulation requires recipients to submit timely progress reports and "Inspection Data." Inspection Data is information about retail enforcement and inspection activities under the terms of the grant. Whether or not a violation was found or a citation issued, e.g., where a retailer was found to be compliant with all tobacco-related laws, the recipient is obliged to submit information about the inspection and compliance.

There are two reasons for the additional requirement regarding Inspection Data: First, to enable the Department to evaluate local grant-funded enforcement activities in something closer to real-time and with more specificity than in a progress report. Second, so that the results of local activities funded by the Department may be combined with data regarding similar retail enforcement and inspection activities performed by state and federal agencies. There is a considerable body of data regarding tobacco products at point-of-sale in California – including retail compliance inspections performed by the U.S. Food and Drug Administration (FDA), the California Department of Public Health, and some local authorities, and also license inspections by state and local authorities. (See, e.g., FDA Compliance Check Inspections of Tobacco Product Retailers, at https://www.accessdata.fda.gov/scripts/oc/inspections/oc_insp_searching.cfm (as of Aug. 11, 2017); California State Board of Equalization California Cigarette & Tobacco Products Licenses, at <https://www.boe.ca.gov/sptaxprog/maps/cigtoblicensees.html> (as of Aug. 11, 2017).)

Requiring recipients to report data about inspections and similar enforcement activities, whether or not a violation was found, will enable the Department to gather and use data from Recipients in ways that are consistent with other retail compliance data, and thus to obtain a more complete understanding of California’s tobacco enforcement needs and strategies. The proposed regulations therefore define a broad category of “Inspection Data” and provide that one of the criteria for evaluation of applications is the capacity and assent of an applicant to gather and report this data.

Section 999.319. Withholding of Ten Percent Pending Closeout

This proposed regulation provides for a small withholding by the Department in the event that there are unresolved performance or audit matters. This provision will encourage compliance with the terms of the grant.

Section 999.320. Use of Program Income

The Department does not anticipate that any grants will generate program income. Nevertheless, this proposed regulation provides for return or reinvestment of program income in the event any is generated, and also clarifies that fines, penalties, legal expenses and attorney’s fees generated from violations of tobacco-related laws are not considered program income. Thus, in the event a local authority used grant funds to conduct tobacco retailer inspections and levied fines on non-compliant retailers, those fines would not be considered program income. Similarly, if a local authority used grant funds to bring an unfair competition action under Business and Professions Code section 17200 and obtained penalties and attorney’s fees, that income would not be program income.

This provision will incentivize grant recipients to use their existing enforcement measures, and will reduce the burden of accounting and reporting. The alternative – requiring reimbursement of income generated from grant-related enforcement activities – would place complex and burdensome reporting and reimbursement requirements on recipients and possibly discourage those recipients from seeking monetary penalties to which they are properly entitled.

Section 999.321. Procurement of Goods and Services

This proposed regulation requires recipients to follow their own policies and procedures as to procurement of goods and services, travel, transportation expenses, meals, lodging and incidentals. The purpose of this provision is to reduce the burden falling on recipients. This is more reasonable than the alternative – requiring local jurisdictions to comply with state policies and procedures in all these areas – which could undermine local authority and introduce unnecessary complexity.

Section 999.322. Use of Contractors; Recipient Responsibilities; Written Agreement; Invoices

This proposed regulation allows grant recipients to contract, with approval by the Department, for services that cannot reasonably be provided by the recipient itself. The contractual service must be for the statutory purpose of supporting front-line law enforcement peace officers to perform tobacco-related enforcement under the terms of the grant agreement. The purpose of this provision is to enable recipients to perform tobacco-related enforcement in ways that are efficient and cost-effective. The Department has been informed by local stakeholders that it is not necessary, feasible or cost-effective for police or sheriffs to perform certain types of tobacco law enforcement activities. For instance, it costs a city or county much less, but the same goal is achieved, when a health department inspector rather than a team of uniformed officers, inspects a tobacco retailer to determine if the license is valid and properly displayed, if the requisite signage regarding sales to minors is properly displayed, if prohibited or contraband tobacco products are visible, if tobacco products are displayed for self-service, or if a tobacco product vending machine is accessible to minors. This type of enforcement activity can be performed at lower cost and greater convenience by the inspector than by a team of uniformed officers. Similarly, retailer education about the sale and furnishing of tobacco products to minors may be performed at lower cost by non-uniformed personnel. Allowing for the use of contractors is likely to result in more frequent and effective enforcement, which is consistent with the statutory purposes. It will also enable recipients to allocate enforcement resources to the areas of greatest need and greatest impact. The alternative, requiring all tobacco-related enforcement under the grant to be performed by uniformed officers according to protocols for undercover operations involving a minor, would be likely to discourage local authorities from applying for a grant and to hinder cost-effective use of the grant funds awarded.

This proposed regulation requires that recipients that utilize contractors are responsible for ensuring performance and reporting by contractors, proper award of contracts, and proper accounting procedures in relation to each contractor. These measures will ensure accountability. For all of these reasons the Department proposes regulations that allow for, but do not require, use of contractors.

Section 999.323. Administrative Costs

This proposed regulation reiterates the statutory provision setting a maximum on administrative costs, and is intended to ensure that applicants are aware of this requirement.

Section 999.324. Program Costs

This proposed regulation allows recipients to include the costs of purchasing tobacco products during enforcement operations as allowable program costs. The price of tobacco products, in particular electronic smoking devices, is not insignificant. This provision will enable recipients to recover the full costs of large-scale and regular retail compliance operations, and thus satisfies a central purpose of the Act. The purpose of this measure is also to ensure that recipients will seek to purchase a wide range of tobacco products and not seek to purchase only low-cost products and discount brands, and to use various types of mobile payment technologies. In these ways undercover purchasers will more closely resemble typical purchasers and users of tobacco products.

Section 999.325. Records of Tobacco Products

This proposed regulation requires recipients to maintain certain records relating to the tobacco products obtained during the course of grant-related activities, but does not require that the products be maintained. The purpose of this provision is to minimize the burden on recipients (by not requiring that the products be retained) while ensuring that program activities may be audited and evaluated. allow recipients to include the costs of purchasing tobacco products during enforcement operations as allowable program costs. If recipients choose to do so, they are required to include this as a cost item in the application and to preserve the purchase records. The price of tobacco products, in particular electronic smoking devices, is not insignificant. This provision will enable recipients to recover the full costs of large-scale and regular retail compliance operations, and thus satisfies a central purpose of the Act. The provision places only a small record-keeping burden on recipients.

Section 999.326. Travel

The proposed regulations require recipients to follow their own policies and procedures as to travel, transportation, lodging and related costs, and to retain certain receipts. The purpose of these provisions is to reduce the burden falling on recipients. This is more reasonable than the alternative – requiring local jurisdictions to comply with state policies and procedures in all these areas – which could undermine local authority and introduce unnecessary complexity.

Section 999.327. Travel Transportation Expenses

The proposed regulations require recipients to follow their own policies and procedures as to travel, transportation, lodging and related costs, and to retain certain receipts. The purpose of these provisions is to reduce the burden falling on recipients. This is more reasonable than the alternative – requiring local jurisdictions to comply with state policies and procedures in all these areas – which could undermine local authority and introduce unnecessary complexity.

Section 999.328. Meals, Incidentals, Lodging Expenses While Traveling

The proposed regulations require recipients to follow their own policies and procedures as to travel, transportation, lodging and related costs, and to retain certain receipts. The purpose of

these provisions is to reduce the burden falling on recipients. This is more reasonable than the alternative – requiring local jurisdictions to comply with state policies and procedures in all these areas – which could undermine local authority and introduce unnecessary complexity.

Section 999.329. Equipment Property Records

This proposed regulation requires recipients to maintain property records for equipment purchased with grant funds for an amount exceeding \$500. The Department does not anticipate that recipients will be required to purchase a significant quantity or value of equipment to undertake grant-related activities. However, in the event that items are purchased for over \$500, this recordkeeping requirement will facilitate auditing while placing a minimal burden on recipients.

Section 999.330. Records Retention; Access

This proposed regulation requires recipients to retain certain records and to make them available to the Department. The purpose of this requirement is to facilitate and make possible later evaluation and audit of grant-funded activities, while easing the burden on recipients by not requiring that originals be retained or that records be retained for an excessive length of time.

Section 999.331. Remedies for Noncompliance

This proposed regulation empowers the Department to take specified, calibrated actions against a recipient for non-compliance. The purpose of this provision is to safeguard against waste and inefficiency in the program, to ensure that recipients perform according to the terms of the grant agreement, and to give the Department several avenues for recourse in the event that a recipient is non-compliant.

Section 999.332. Additional Conditions

This proposed regulation provides that the Department may impose additional conditions on a recipient for certain specified reasons, and sets forth how notice of such action is to be provided. The purpose of this measure is to provide the Department with recourse in the event a recipient is non-compliant with the terms of the grant agreement, and to ensure that due process notice requirements are satisfied.

Section 999.333. Termination

This proposed regulation provides that the Department may terminate a grant for non-compliance with the terms of the grant agreement. The purpose of this measure is to provide the Department with recourse and to ensure that due process notice requirements are satisfied.

Section 999.334. Closeout

This proposed regulation sets forth the procedures for closing-out a grant. The purpose of this measure is establish clear, reasonable and systematic processes for the parties to follow at the conclusion of the grant activities.

Section 999.335. Allowable Costs; Reasonable Costs; Allocable Costs

This proposed regulation provides instruction to recipients as to what costs are properly allowed and allocated to projects approved in a grant agreement. Costs must be necessary, reasonable, documented, and allowable under the terms of the grant agreement. In addition, similar costs must be treated consistently. For example, if an agency bills a certain amount for each retail compliance inspection it conducts under the requirements of a local tobacco retail licensing ordinance, it may not charge a different cost for similar enforcement action it conducts under the terms of a grant. Similarly, the costs of the same enforcement activities cannot be assigned to both the tobacco retail licensing ordinance program and the grant program. In the same way, costs for similar services, such as for phone, computer or internet service, should be allocated in consistent ways across similar enforcement activities. The primary purpose for this requirement is to ensure that funds are not supplanted in violation of the Act.

Section 999.336. Guidance on Allowable and Unallowable Costs

This proposed regulation allows the Department to publish guidance regarding allowable and unallowable costs in the Request for Proposals. This purpose of this provision is to enable applicants to receive specific details regarding costing, and to allow the Department to accommodate local priorities and shifts in enforcement into the program costing process.

Section 999.337. Appeals

This proposed regulation sets forth the types of decisions that may be appealed and the appellate procedures. The purpose of this measure is to provide due process notice, establish processes for the parties to correct mistakes, ensure fairness, and improve the overall efficacy of the grant program.

IV. BENEFITS ANTICIPATED FROM REGULATORY ACTION

The Department has made an initial determination that the proposed regulations will benefit California residents in numerous ways. The proposed regulations will establish and advance the operation of a grant program that will expand and enhance local enforcement of tobacco-related measures. This is intended and likely to reduce use of and exposure to tobacco products, in particular by youth. The Act includes the following findings regarding tobacco use: over 40,000 Californians die every year from tobacco disease; California taxpayers pay \$3.5 billion each year for tobacco-related healthcare expenses; and the cost of lost productivity in California each year as a result of tobacco use is estimated at over \$10 billion. (See Healthcare, Research and Prevention Tobacco Tax Act, 2016 Cal. Legis. Serv. Prop. 56, § 1, subds. (a) & (b) (Proposition 56) (West). Accordingly, the proposed regulations will benefit California in the following ways:

- *Public health:* Expanded and more effective local enforcement of tobacco-related measures, including to prevent predatory marketing to youth and sales to minors, is likely to reduce use of and exposure to tobacco products. This will have a public health benefit.

- *Economic wellbeing:* Use of and exposure to tobacco products is associated with a large loss in productivity. To the extent that the grant program results in a reduction of use of and exposure to tobacco products, it will promote economic vitality.
- *Compliance:* The grant program will fund improved local enforcement and retailer education, and this will increase compliance with state and local tobacco laws.
- *Safety:* Combustible tobacco products are a major cause of fires in California. Electronic cigarettes can explode. The proposed regulations, to the extent they result in reduced use of tobacco products, will reduce the likelihood of fire and explosion.
- *Environmental sustainability:* Vast quantities of cigarette butts, foil wrappers, battery, plastic and electronic components of electronic cigarettes, lighters, and cigarette packs, are improperly discarded. This tobacco product waste contaminates waterways, poisons aquatic life, blocks drains, chokes birds, creates unsightly litter, and requires public entities to spend large sums on ongoing clean-up operations. The proposed regulations, to the extent they result in reduced use of tobacco products, will reduce environmental degradation.
- *Efficient, transparent and effective government:* The proposed regulations establish a grant program that will efficiently and fairly distribute funds to local government agencies, promote effective enforcement, and the process will be transparent to applicants, recipients and the public.

V. REGULATIONS MANDATED BY FEDERAL LAW

None of the proposed regulations are identical to corresponding federal regulations.

VI. ECONOMIC IMPACT ASSESSMENT (EIA)

Creation or Elimination of California Jobs:

The Department has determined that the proposed regulations will not eliminate jobs and are not expected to create jobs in California. The proposed regulations do not regulate California businesses or jobs. Rather, they govern the distribution of state funds to local law enforcement agencies. It is possible that local government agencies will hire individuals to perform certain funded activities, but this is not required.

Creation, Elimination or Expansion of California Businesses:

The Department has determined that the proposed regulations will not create new, eliminate existing, or expand existing businesses within California. The proposed regulations do not regulate California businesses. Rather, they govern the distribution of state funds to local law enforcement agencies.

VII. TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDIES, REPORTS OR DOCUMENTS

Department staff has carefully studied the Act; discussed the Act and draft regulations with individuals in local law enforcement and public health agencies, community organizations, state public health and taxation agencies, state agencies that administer grant programs, and other agencies; reviewed documentary materials regarding federal, state and local enforcement

of tobacco-related measures; reviewed documentary materials regarding tobacco-related public health issues and policies; and reviewed documentary materials relating to a variety of grant programs including but not limited to those administered by the California Department of Public Health, California Governor's Office of Emergency Services, California Office of Traffic Safety, and California Department of Alcoholic Beverage Control.

The Department has also reviewed California's other tobacco-related statutes, certain cases interpreting the same, publications and data available on the website of California's Tobacco Control Program, publications and data available on the website of the federal Food and Drug Administration Center for Tobacco Products, and manuals and guidance documents produced by stakeholders with whom the Department consulted.

The goal of these investigations was to gain a thorough understanding of current tobacco-related enforcement issues in California, and of best practices and possible pitfalls for a grant program to fund local enforcement as specified by the Act.

VIII. REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD BE LESS BURDENSOME AND EQUALLY EFFECTIVE IN ACHIEVING THE PURPOSES OF THE ACT BEING IMPLEMENTED

The Department also considered reasonable alternatives to the proposed regulations, in particular those that might be less burdensome yet equally effective. (See Gov. Code, § 11346.2, subd. (b)(4)(A).) The Department was made aware, as a result of meeting with local stakeholders, that local law enforcement agencies would be unlikely to apply for grants if doing so would unreasonably burden them. The Department therefore sought through the proposed regulations to implement best practices for grant making, administration, performance, evaluation, reporting and auditing, to ensure fairness and accountability. However, within these parameters, the Department considered how not to burden recipients or the Department as regards grant application, evaluation, administration, evaluation, recordkeeping, or reporting.

IX. REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The Department has made an initial determination that the proposed regulations will not have an adverse economic impact on small businesses in California because the regulations will not regulate California businesses. Rather, the proposed regulations merely govern the distribution of state funds to local law enforcement agencies. Therefore, the proposed regulations will not create new or eliminate existing jobs within the state, create new or eliminate existing businesses within the state, or expand businesses currently doing business within the state. (See Gov. Code, § 11346.3, subd. (b)(1)(A)-(C).) As discussed in the Notice, the proposed regulations will be likely to have a positive economic impact, including on small businesses, insofar as they benefit the health and welfare of California residents, worker safety, and the state's environment. (See Gov. Code, § 11346.3, subd. (b)(1)(D).)

X. MANDATES OR PRESCRIPTIVE STANDARDS

The proposed regulations do not mandate the use of any specific technology or equipment, or prescribe a specific standard.

XI. EVIDENCE SUPPORTING DETERMINATION OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The Department has made an initial determination that the proposed regulations will not have an adverse economic impact on businesses or jobs in California because the regulations will not regulate California businesses or jobs. The proposed regulations merely govern the distribution of state funds to local law enforcement agencies and therefore will not create new or eliminate existing jobs within the state, create new or eliminate existing businesses within the state, or expand businesses currently doing business within the state. (See Gov. Code, § 11346.3, subd. (b)(1)(A)-(C).) As discussed in the Notice, the proposed regulations will be likely to have a positive economic impact, including on businesses, insofar as they benefit the health and welfare of California residents, worker safety, and the state's environment. (See Gov. Code, § 11346.3, subd. (b)(1)(D).)